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SALLIE MAE, INC.

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

ANNISA MAYER, Plaintiff, vs. SALLIE MAE, Defendant.	Case No. 08 CV 0853IEG AJB MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT SALLIE MAE, INC.'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT FOR DAMAGES PURSUANT TO FED. R. CIV. P. 12(b)(6) [NO ORAL ARGUMENT PURSUANT TO LOCAL RULE] Hearing Date: October 14, 2008 Time: 10:30 a.m. Courtroom: 1

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TABLE OF CONTENTS

Page

MEMORANDUM OF POINTS AND AUTHORITIES 1

1. Introduction 2
2. Procedural History 5
3. Law and Argument 5
    a. Standard of Review 5
    b. Count I for Violations of the FDCPA Does Not State a Claim upon Which Relief Can Be Granted and Must Be Dismissed Because Defendant Sallie Mae is Not a "Debt Collector" Within the Meaning of the FDCPA 6
    c. Count II for Violations of the California Rosenthal Act Fails to State a Claim upon Which Relief Can Be Granted and Must Be Dismissed Because the Facts Alleged to Give Rise to Count II are Absolutely Privileged Pursuant to California Civil Code § 47(b) 8
    d. Sallie Mae Cannot be liable for Violations of the California Rosenthal Act for Pursing the Action in Los Angeles County because (1) Plaintiff Resided in Los Angeles County at the Time the Loans Were Made and (2) the Loans Were Made in Los Angeles County 11
4. Conclusion 13

TABLE OF AUTHORITIES

Page

Cases:

Bell Atlantic Corp. v. Twonbly, 127 S.Ct. 1955, 1965 (2007) 6, 8

Cahill v. Liberty Mut. Ins. Co., 80 F.3d 336, 337-38 (9th Cir. 1996) 6

Coppola v. Connecticut Student Loan Foundation, Case No. N-87-398 (JAC), 1989 U.S. Dist. LEXIS 3415, *6-*7 (D. Conn. 1989) 7, 8

Fischer v. Unipac Serv. Corp. and Student Loan Mktg. Ass'n, 519 N.W.2d 793, 799-800 (Iowa 1994) 7, 8

Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc., 896 F.2d 1542, 1555 n. 19 (9th Cir. 1990) 6

Jones v. InTuition, Inc., 12 F. Supp. 2d 775, 779 (W.D. Tenn. 1998) 7, 8

Love v. United States, 915 F.2d 1242, 1245 (9th Cir. 1989) 6

Mier v. Owens, 57 F.3d 747, 750 (9th Cir. 1995) 6

Nickoloff v. Wolpoff & Abramson, 511 F. Supp. 2d 1043 (C.D. Cal. 2007) 11

Pelfrey v. Educ. Credit Mgmt. Corp., 71 F. Supp. 2d 1161, 1170 (N.D. Ala. 1999) 7, 8

Reyes v. Kenosian & Miele, LLP, 525 F.Supp.2d 1158 (N.D.Cal.2007) 11

Rubin v. Green 4 Cal.4th 1187, 1193, 17 Cal.Rptr.2d 828, 847 P.2d 1044 (1993) 10

Rusheen v. Cohen, 37 Cal.4th 1048, 128 P.3d 713, 39 Cal.Rptr.3d 516 (2006) 9, 10, 11

Sengchanthalangsy v. Accelerated Recovery Specialists, Inc., 473 F. Supp. 2d 1083 (S.D. Cal. 2006) 11

Silberg v. Anderson, 50 Cal.3d 205, 215 (1990) 9, 10

Sprewell v. Golden State Warriors, 266 F.3d 979, 988 (9th Cir. 2001) 6

Taylor v. Quall, 458 F. Supp. 2d 1065, 1067 – 68 (C.D. Cal. 2006) 11

Van Buskirk v. Cable News Network, Inc., 284 F.3d 977, 980 (9th Cir. 2002) 6

Statutes & Rules:

Federal

15 U.S.C. § 1692 6

15 U.S.C. § 1692a(6) 2, 7

15 U.S.C. § 1692a(6)(F)(iii) 7

State

Cal.Civ.Code § 47(b) 4, 9, 10

Cal.Civ.Code §47(2) 10

Cal.Civ.Code §1788.15(b) 12

Cal.Civ.Code § 1788.2(b) 2

Cal. Bus.& Prof. Code § 17200 11

Rules

Federal Rules of Civil Procedure, § 4(d) 5

Federal Rules of Civil Procedure, § 12(b) 5

Federal Rules of Civil Procedure, § 12(b)(6) 5, 6

Legislative History/Treatises

S.Rep. No. 95-382, 95th Cong., 1st Sess. 3-4, reprinted in 1977 U.S.Code Cong. and Ad. News 1695, 1698 7

5 Witkin, Summary of Cal. Law, Torts, §§ 470, 505, pp. 554, 59.......... 10

Defendant, Sallie Mae, Inc. ("Sallie Mae"), submits this memorandum of points and authorities in support of its Motion to Dismiss Plaintiff Annisa Mayer's ("Mayer") Complaint for Damages:

I. INTRODUCTION

This matter arises out of the alleged acts, errors and omissions of Defendant Sallie Mae's attorneys in connection with the filling, serving and prosecution of an action to collect a debt owed by Plaintiff Mayer to Defendant Sallie Mae on her defaulted **student loans which Defendant Sallie Mae had been servicing since their inception**.

Plaintiff Mayer alleges two Counts against Defendant Sallie Mae: Count I for Violations of the Fair Debt Collection Practices Act ("FDCPA") and Count II for Violations of the California Rosenthal Fair Debt Collections Practices Act ("California Rosenthal Act").

The relevant factual allegations are found on pages 3 through 7 of the Complaint as follows:

- Plaintiff Mayer **is informed and believes** that Defendant Sallie Mae is a "debt collector" as that term is defined by the FDCPA, 15 U.S.C. § 1692a(6). (Complaint, paragraph 12).
- Plaintiff Mayer is informed and believes that Defendant Sallie Mae is a "debt collector" as that term is defined by the California Rosenthal Act, Civil Code § 1788.2(b). (Complaint, paragraph 13).
- Sometime before June 20, 2006, Plaintiff Mayer allegedly incurred financial obligations to Defendant Sallie Mae that were a debt as defined by the California Rosenthal Act and a consumer debt as defined under the FDCPA. (Complaint, paragraph 17).
- Sometime prior to June 20, 2006, Plaintiff Mayer allegedly fell behind in the payment of her obligations to Defendant Sallie Mae. (Complaint, paragraph 19).

- Sometime prior to June 20, 2006, the alleged debt was assigned, placed or otherwise transferred for collection. (Complaint, paragraph 20).
- On or about June 20, 2006, Defendant Sallie Mae, through the law firm Eltman, Eltman & Cooper, filed suit against Plaintiff Mayer for the alleged debt. (Complaint, paragraph 21).
- The lawsuit was filed in Los Angeles County even though Defendant Sallie Mae was aware that Plaintiff Mayer lived in San Diego and that no contract was entered into in Los Angeles County. (Complaint, paragraph 22).
- By bringing the action in Los Angeles County, Defendant Sallie Mae violated the FDCPA and the California Rosenthal Act. (Complaint, Paragraphs 23, 24 and 31).
- On August 1, 2006, Defendant Sallie Mae filed a Proof of Service of Summons which indicated service on Plaintiff Mayer by substituted service at Plaintiff Mayer's father's home, at an address where Plaintiff Mayer had not lived since 1986. Plaintiff Mayer's father claims that he was not, in fact served at all, but that even if Plaintiff Mayer's father had been served, it would not have been proper service on Plaintiff Mayer. (Complaint, paragraph 25).
- The first time Plaintiff Mayer had knowledge of the lawsuit was late September 2006 while visiting her father, when she saw a letter addressed to her indicating a "Request for Entry of Default" had been filed. (Complaint, paragraph 26).
- In sending the letter to an address other than where Plaintiff Mayer resided, Defendant Sallie Mae violated the FDCPA and California Rosenthal Act. (Complaint, paragraphs 27 and 28).
- Defendant Sallie Mae then obtained a default judgment against Plaintiff Mayer. (Complaint, paragraph 29).

- In obtaining the default judgment, Defendant Sallie Mae violated the FDCPA and California Rosenthal Act. (Complaint, paragraph 30, 33 and 34).
- Plaintiff Mayer then hired a lawyer to set aside the default and default judgment and quash service of the summons. The default and default judgment were set aside and the service of summons quashed because Defendant Sallie Mae's attorneys did not respond in writing or appear at the hearing on the motions. Plaintiff Mayer then was able to have the case dismissed because Defendant Sallie Mae's attorneys failed to appear at two additional hearings. (Complaint, paragraphs 35, 36 and 37).
- Because of the actions of Defendant Sallie Mae's attorneys, it is clear that Defendant Sallie Mae had no intention to properly litigate the action, thereby violating the FDCPA and California Rosenthal Act. (Complaint, paragraph 38 and 39),
- The acts of Defendant Sallie Mae caused Plaintiff Mayer substantial damages (Complaint, paragraph 40).

Even assuming, *arguendo*, that all of the allegations contained in Plaintiff Mayer's Complaint were true, the Complaint, and specifically each claim for relief contained therein alleged against Defendant Sallie Mae, must be dismissed because (1) Plaintiff Mayer has failed to establish that Defendant Sallie Mae is a "debt collector" within the meaning of the FDCPA, (2) Defendant Sallie Mae's litigation-related "conduct" is absolutely privileged pursuant to Cal. Civ. Code §47(b), and (3) Count II fails to state a claim upon which relief can be granted because Plaintiff resided in Los Angeles County at the time the Loans were made and the Loans were made in Los Angeles County.

II. PROCEDURAL HISTORY

On or about May 13, 2008, Plaintiff Mayer filed her Complaint for Damages in the Southern District Court of California entitled *Annisa Mayer v. Sallie Mae*, which was assigned Case No. 08 CV 0853IEG AJB.

The Complaint was served on Defendant Sallie Mae via U.S. Mail on or about June 26, 2008 pursuant to Fed.R.Civ.P. 4(d), which included a request for waiver of service of summons. On or about July 18, 2008, Defendant Sallie Mae's counsel executed and returned the waiver to Plaintiff Mayer's counsel.

Defendant Sallie Mae's responsive pleading is therefore due August 25, 2008.

III. LAW AND ARGUMENT SUMMARY

A. Standard of Review

Fed.R.Civ.P. 12(b) provides that, "Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion:

...

(6) failure to state a claim upon which relief can be granted"

A Rule 12(b)(6) motion tests the legal sufficiency of the claims asserted in the complaint.

Under Rule 12(b)(6), a "complaint should not be dismissed unless it appears beyond doubt that Plaintiff can prove no set of facts in support of his claim which would entitle him to

relief. *Van Buskirk v. Cable News Network, Inc.*, 284 F.3d 977, 980 (9th Cir. 2002) (citing *Rabang v. INS*, 35 F.3d 1449, 1451 (9th Cir. 1994)); *see also Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001); *Love v. United States*, 915 F.2d 1242, 1245 (9th Cir. 1989).

In deciding whether this standard is satisfied, the court generally looks only to the face of the complaint and documents attached thereto. *Van Buskirk*, 284 F.3d at 980; *Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc.*, 896 F.2d 1542, 1555 n. 19 (9th Cir. 1990). The court must accept all factual allegations pleaded in the complaint as true and construe them and draw all reasonable inferences from them in favor of the nonmoving party. *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337-38 (9th Cir. 1996); *Mier v. Owens*, 57 F.3d 747, 750 (9th Cir. 1995). It need not, however, accept as true unreasonable inferences or conclusory legal allegations cast in the form of factual allegations. *See Bell Atlantic Corp. v. Twonbly*, 127 S.Ct. 1955, 1965 (2007)("While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitlement' to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact)"(citations omitted).

B. Count I for Violations of the FDCPA Does Not State a Claim upon Which Relief Can Be Granted and Must Be Dismissed Because Defendant Sallie Mae is Not a "Debt Collector" Within the Meaning of the FDCPA.

A limited private right of action exists for violations of the provisions of 15 U.S.C. § 1692; *et seq.* ("the FDCPA") by a "debt collector" as defined by the FDCPA. Before a consumer such as Plaintiff Mayer may sue for violations of the FDCPA, she must first establish that the defendant is a "debt collector" within the meaning of the FDCPA.

Pursuant to the FDCPA, a "debt collector" is a person whose "principal [business] purpose is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owned or due or asserted to be due owed or due another." (§ 1692(a) (6)). **The term "debt collector" does not include "any person collecting or attempting to collect any debt owed or due or asserted to be owed or due to another to the extent such activity ... concerns a debt which was not in default at the time it was obtained by such person ... ."** 15 U.S.C. § 1692a(6)(F)(iii) (emphasis added). The legislative history of the Act indicates that Congress intended that parties who service debts not in default when obtained (such as mortgages and student loans) should be excluded from the Act's coverage. S.Rep. No. 95-382, 95th Cong., 1st Sess. 3-4, reprinted in 1977 U.S.Code Cong. And Ad. News 1695, 1698. In addition, courts have held that defendants who began servicing student loans before such loans were in default are not "debt collectors" within the meaning of the FDCPA. *See Pelfrey v. Educ. Credit Mgmt. Corp.,* 71 F. Supp. 2d 1161, 1170 (N.D. Ala. 1999)(reviewing case law and noting that student loan servicers are not subject to the FDCPA if they began servicing the student loan before the borrower defaulted); *Jones v. InTuition, Inc.,* 12 F. Supp. 2d 775, 779 (W.D. Tenn. 1998)(holding that defendant was not a "debt collector" as defined by the FDCPA since the defendant began servicing the student loan at issue before the loan was in default); *Coppola v. Connecticut Student Loan Foundation,* Case No. N-87-398 (JAC), 1989 U.S. Dist. LEXIS 3415, *6-*7 (D. Conn. 1989)(holding that student loan servicer was excluded from the FDCPA's definition of "debt collector"); *Fischer v. Unipac Serv. Corp. and Student Loan Mktg. Ass'n,* 519 N.W.2d 793, 799-800 (Iowa 1994)(Collection efforts by holders of federally insured student loans or their servicing companies are not the kind of activity that Congress intended to regulate in enacting Federal Fair Debt Collection Practices Act).

In the present case, Plaintiff Mayer must plead the facts necessary to establish that Defendant Sallie Mae is a "debt collector" within the meaning of the FDCPA. Although Plaintiff Mayer alleges **on information and belief** that Defendant Sallie Mae is a "debt collector," (Complaint, paragraph 12), " a formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic Corp.*, 127 S.Ct at 1965. Plaintiff has not set forth any such facts, much less sufficient facts, in support of its conclusory statement that Sallie Mae is a debt collector. In fact, as established by the Declaration of James M. Austin filed concurrently herewith, Defendant Sallie Mae has been servicing the obligation in question since its inception, *before* such loans were in default.[1]

As a servicer who began servicing Plaintiff's student loans **before** such loans were in default, defendant Sallie Mae is not a "debt collector" as defined by the FDCPA. *See Pelfrey v. Educ. Credit Mgmt. Corp.,* 71 F. Supp. 2d at 1170; *Jones v. InTuition, Inc.*, 12 F. Supp. 2d at 779); *Coppola v. Connecticut Student Loan Foundation,* Case No. N-87-398 (JAC), 1989 U.S. Dist. LEXIS 3415, *6-*7; *Fischer v. Unipac Serv. Corp. and Student Loan Mktg. Ass'n,* 519 N.W.2d at 799-800.

Because Defendant Sallie Mae is not a "debt collector" within the meaning of the FDCPA, Plaintiff Mayer cannot maintain a claim against Sallie Mae for violation of the FDCPA. Therefore, this Court must grant Defendant Sallie Mae's Motion to Dismiss Count I of Plaintiff Mayer's Complaint.

C. Count II for Violations of the California Rosenthal Act Fails to State a Claim

[1] Plaintiff knows who has serviced these loans from their inception and certainly before she defaulted on the loans and should have shared that information with her attorneys.

upon Which Relief Can Be Granted and Must Be Dismissed Because the Facts Alleged to Give Rise to Count II are Absolutely Privileged Pursuant to California Civil Code § 47(b).

Plaintiff Mayer's Count II alleges that Defendant Sallie Mae violated the California Rosenthal Act when: Defendant Sallie Mae's attorneys filed suit against Plaintiff Mayer for the alleged debt in Los Angeles County, while Plaintiff Mayer lived in San Diego; Defendant Sallie Mae's attorneys served Plaintiff by substitute service at Plaintiff's father's home, an address where Plaintiff allegedly had not lived since 1986; Defendant Sallie Mae's attorneys sent letters to the service address informing her that a "Request for Entry of Default" had been filed; Defendant Sallie Mae's attorneys obtained a default judgment against Plaintiff Mayer despite allegedly improperly serving Plaintiff; and, Defendant Sallie Mae's attorneys failed to litigate the case by failing to appear and respond to Plaintiff's motions to vacate the default and default judgment and to quash service of the summons, as well as by not appearing at two additional hearings. Regardless of the truthfulness of such allegations, Plaintiff's California Rosenthal Act claims are absolutely barred by the California litigation privilege, Cal. Civ. Code § 47(b).

The California litigation privilege of Cal. Civ. Code § 47(b) is absolute in nature and includes all of the alleged actions of Sallie Mae in the Complaint. *Rusheen v. Cohen*, 37 Cal.4th 1048, 128 P.3d 713, 39 Cal.Rptr.3d 516 (2006). It is clear that the litigation privilege applies to all communications made during a judicial proceeding. *Silberg v. Anderson*, 50 Cal.3d 205, 215 (1990). And, if the gravamen of the action is communicative, the litigation privilege extends to noncommunicative acts that are necessarily related to the communicative conduct. *Rusheen*, 37 Cal.4th 1048, 1065. "Stated another way, unless it is demonstrated that an independent, noncommunicative, wrongful act was the gravamen of the action, the litigation privilege applies." *Id.*

> "Although originally enacted with reference to defamation [citation], the privilege is now held applicable to any communication, whether or not it

> amounts to a publication [citations], and **all torts** except malicious prosecution. [Citations.] Further, it applies to any publication required or permitted by law in the course of a judicial proceeding to achieve the objects of the litigation, even though the publication is made outside the courtroom and no function of the court or its officers is involved. [Citations.] [¶] The usual formulation is that the privilege applies to any communication (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that have some connection or logical relation to the action. [Citations.]" (*Silberg v. Anderson* (1990) 50 Cal.3d 205, 212, 266 Cal.Rptr. 638, 786 P.2d 365 (*Silberg).)* Thus, "communications with 'some relation' to judicial proceedings" are "absolutely immune from tort liability" by the litigation privilege (*Rubin v. Green* (1993) 4 Cal.4th 1187, 1193, 17 Cal.Rptr.2d 828, 847 P.2d 1044 (*Rubin*)). It is not limited to statements made during a trial or other proceedings, but may extend to steps taken prior thereto, or afterwards. (5 Witkin, Summary of Cal. Law, *supra,* Torts, §§ 470, 505, pp. 554, 591.) (Emphasis added) *Id.* at 1057.

In Rusheen, the Court's focus was what the gravamen of the action was. *Id.*

> ... Thus, where the gravamen of the complaint is a privileged communication (i.e., allegedly perjured declarations of service) the privilege extends to necessarily related noncommunicative acts (i.e., act of levying). *Id.* at 1062.
>
> Extending the litigation privilege to postjudgment enforcement activities that are necessarily related to the allegedly wrongful communicative act is consistent with public policy considerations. The purposes of section 47, subdivision (b), are to afford litigants and witnesses free access to the courts without fear of being harassed subsequently by derivative tort actions, to encourage open channels of communication and zealous advocacy, to promote complete and truthful testimony, to give finality to judgments, and to avoid unending litigation (*Silberg, supra,* 50 Cal.3d at pp. 213-214, 266 Cal.Rptr. 638, 786 P.2d 365.) To effectuate these purposes, the litigation privilege is absolute and applies regardless of malice. (*Id.* at pp. 215-216, 266 Cal.Rptr. 638, 786 P.2d 365.) Moreover, "[i]n furtherance of the public policy purposes it is designed to serve, the privilege prescribed by section 47(2) has been given broad application." (*Id.* at p. 211, 266 Cal.Rptr. 638, 786 P.2d 365.)

Id at 1062-3.

In addition to communicative acts in judicial proceedings[2], the privilege "applies to any publication required or permitted by law in the course of a judicial proceeding to achieve the objects of the litigation, even though the publication is made outside the courtroom and no function of the court or its officers is involved." *Id.* at 212.

Count II is solely based on the alleged acts of Sallie Mae's attorneys in connection with the filing, serving and prosecution of the collection action, which are either communicative acts or non-communicative acts necessarily related to the communicative conduct, and which are necessarily related to the filing, service and prosecution of the underlying state court action. As Plaintiff cannot demonstrate that an independent, noncommunicative, wrongful act is the gravamen of Count II, the litigation privilege bars Plaintiff's state law claims and this Court must grant Defendant Sallie Mae's Motion to Dismiss Count II of Plaintiff Mayer's Complaint.

D. Sallie Mae Cannot be liable for Violations of the California Rosenthal Act for Pursing the Action in Los Angeles County because (1) Plaintiff Resided in Los Angeles County at the Time the Loans Were Made and (2) the Loans Were Made in Los Angeles County.

Count II fails to state a claim upon which relief can be granted because Plaintiff resided in Los Angeles County at the time the Loans were made and the Loans were made in Los Angeles

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[2] California courts have consistently applied the litigation privilege to bar state law claims based upon communications occurring in connection with collection actions. *See, e.g. Reyes v. Kenosian & Miele, LLP,* 525 F.Supp.2d 1158 (N.D.Cal.2007) (Rosenthal Act claims based on allegations in collection complaint barred by litigation privilege); *Nickoloff v. Wolpoff & Abramson,* 511 F. Supp. 2d 1043 (C.D. Cal. 2007) (privilege barred Rosenthal Act claim based on evidence proffered during arbitration proceeding); *Sengchanthalangsy v. Accelerated Recovery Specialists, Inc.*, 473 F. Supp. 2d 1083 (S.D. Cal. 2006) (privilege barred claims for fraud, negligence and violations of Cal. Bus. & Prof. Code § 17200 based upon allegedly false affidavit used in connection with collection action); *Taylor v. Quall,* 458 F. Supp. 2d 1065, 1067-68 (C.D. Cal. 2006) (privilege barred Rosenthal Act claim and § 17200 claim based upon allegedly false statements made in connection with collection litigation).

County.

The crux of Plaintiff's Count II for violations of the California Rosenthal Act appears to be that the underlying collection complaint was filed and prosecuted in the wrong county when it was filed and prosecuted in Los Angeles County. (Complaint, Paragraphs 22,23, 24 and 31.) [3]

Cal.Civ.Code Code §1788.15(b) provides that it is a violation of the California Rosenthal Act to collect through a judicial proceeding in a county **other than the county in which the debtor incurred the consumer debt or the county in which the debtor** resides at the time such proceedings are instituted, or **resided a the time the debt was incurred.**

However, at the time Plaintiff executed the three promissory notes that were placed for collection with Eltman, Eltman & Cooper, Plaintiff attended UCLA and listed Los Angeles county on at least one of the three promissory notes in question. (See Austin Declaration, paragraphs 7 and 8 and Exhibit A attached thereto. In addition, all the loans obtained by Plaintiff, pursuant to Plaintiff's own instructions, were disbursed to the University of California at Los Angeles, which is located in Los Angeles County, California.

Thus Plaintiff has not alleged, and cannot allege, facts sufficient to support a claim for violation of the California Rosenthal Act.

Because the basis of Plaintiff's Count II, is the filing of a lawsuit in the wrong county,

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[3] The other acts alleged in the Complaint are clearly communicative or non-communicative conduct necessarily related to the filing, service and prosecution of the underlying state court action.

Count II fails to state a claim upon which relief can be granted because the debt was incurred in Los Angeles County and/or Plaintiff resided in Los Angeles County at the time the debt was incurred. Accordingly, Plaintiff's Count II should be dismissed.

III. CONCLUSION

As Plaintiff Mayer has failed to state facts sufficient to state claims for relief under either the FDCPA or the California Rosenthal Act, this Court must grant Defendant Sallie Mae's Motion to Dismiss Plaintiff Mayer's Complaint.

Dated: August 4, 2008

The Moore Law Group, APC

By: ________________________
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